

111TH CONGRESS 1st Session	HOUSE OF REPRESENTATIVES	REPORT 111-
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TO AMEND THE EXECUTIVE COMPENSATION PROVISIONS OF THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008 TO PROHIBIT UNREASONABLE AND EXCESSIVE COMPENSATION AND COMPENSATION NOT BASED ON PERFORMANCE STANDARDS

30
MARCH 1, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. FRANK of Massachusetts, from the Committee on Financial Services, submitted the following

R E P O R T

together with

Dissenting VIEWS

[To accompany H.R. 1664]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 1664) to amend the executive compensation provisions of the Emergency Economic Stabilization Act of 2008 to prohibit unreasonable and excessive compensation and compensation not based on performance standards, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. PROHIBITION ON CERTAIN COMPENSATION.

(a) PROHIBITION ON CERTAIN COMPENSATION NOT BASED ON PERFORMANCE STANDARDS.—Section 111 of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221) is amended by redesignating subsections (e) through (h) as subsections (f) through (i), and inserting after subsection (d) the following:

“(e) PROHIBITION ON CERTAIN COMPENSATION NOT BASED ON PERFORMANCE STANDARDS.—

“(1) PROHIBITION.—No financial institution that has received or receives a direct capital investment under the Troubled Assets Relief Program under this

title, or with respect to the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a Federal home loan bank, under the amendments made by section 1117 of the Housing and Economic Recovery Act of 2008, may, while that capital investment remains outstanding, make a compensation payment, other than a longevity bonus or a payment in the form of restricted stock, to any executive or employee under any existing compensation arrangement, or enter into a new compensation payment arrangement, if such compensation payment or compensation payment arrangement—

“(A) provides for compensation that is unreasonable or excessive, as defined in standards established by the Secretary, in consultation with the Chairperson of the Congressional Oversight Panel established under section 125, in accordance with paragraph (2); or

“(B) includes any bonus or other supplemental payment that is not directly based on performance-based measures set forth in standards established by the Secretary in accordance with paragraph (2).

Provided that, nothing in this paragraph applies to an institution that did business with a recipient of a direct capital investment under the TARP.

“(2) STANDARDS.—Not later than 30 days after the date of enactment of this subsection, the Secretary, with the approval of the agencies that are members of the Federal Financial Institutions Examination Council, and in consultation with the Chairperson of the Congressional Oversight Panel established under section 125, shall establish the following:

“(A) UNREASONABLE AND EXCESSIVE COMPENSATION STANDARDS.—Standards that define ‘unreasonable or excessive’ for purposes of subparagraph (1)(A).

“(B) PERFORMANCE-BASED STANDARDS.—Standards for performance-based measures that a financial institution must apply when determining whether it may provide a bonus or retention payment under paragraph (1)(B). Such performance measures shall include—

“(i) the stability of the financial institution and its ability to repay or begin repaying the United States for any capital investment received under this title;

“(ii) the performance of the individual executive or employee to whom the payment relates;

“(iii) adherence by executives and employees to appropriate risk management requirements; and

“(iv) other standards which provide greater accountability to shareholders and taxpayers.

“(3) REPORTING REQUIREMENT.—

“(A) IN GENERAL.—Any financial institution that is subject to the requirements of paragraph (1) shall, not later than 90 days after the date of enactment of this subsection and annually on March 31 each year thereafter, transmit to the Secretary, who shall make a report which states how many persons (officers, directors, and employees) received or will receive total compensation in that fiscal year in each of the following amounts:

“(i) over \$500,000;

“(ii) over \$1,000,000;

“(iii) over \$2,000,000;

“(iv) over \$3,000,000; and

“(v) over \$5,000,000.

The report shall distinguish amounts the institution considers to be a bonus and the reason for such distinction. The name or identity of persons receiving compensation in such amounts shall not be required in such reports. The Secretary shall make such reports available on the Internet. Any financial institution subject to this paragraph shall issue a retrospective annual report for 2008 and both a prospective and retrospective annual report for each subsequent calendar year until such institution ceases to be subject to this paragraph.

“(B) TOTAL COMPENSATION DEFINED.—For purposes of this paragraph, the term ‘total compensation’ includes all cash payments (including without limitation salary, bonus, retention payments), all transfers of property, stock options, sales of stock, and all contributions by the company (or its affiliates) for that person’s benefit.”

(b) REVISION TO RULE OF CONSTRUCTION.—Section 111(b)(3)(D)(iii) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221(b)(3)(D)(iii)) is amended by inserting before the period the following: “, except that an entity subject to subsection (e) may not, while a capital investment described in that subsection remains outstanding, pay a bonus or other supplemental payment that is otherwise prohib-

ited by clause (i) without regard to when the arrangement to pay such a bonus was entered into".

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AMENDMENT

[GPO: Insert text of amendment here.]

PURPOSE AND SUMMARY

The purpose of this bill is to prohibit financial institutions that receive direct capital investments under the Troubled Asset Relief Program (TARP) established by the Emergency Economic Stabilization Act of 2008 (EESA) and institutions that receive direct capital investments under the Housing and Economic Recovery Act of 2008 (HERA) from paying their executives and employees (a) compensation that is unreasonable or excessive or (b) bonuses or other supplemental payments that are not directly based on performance-based standards for the period during which such investments remain outstanding. In addition, the bill would ensure that the limits on compensation for highly-compensated employees included in Title VII of the American Recovery and Reinvestment Act of 2009 (ARRA), which amended Title I of EESA, apply to highly-compensated employees of financial institutions that receive direct capital investments under TARP for the period during which such investments remain outstanding regardless of when a compensation agreement was executed.

BACKGROUND AND NEED FOR LEGISLATION

The TARP, established by EESA in October 2008, was designed to restore liquidity and stability to the U.S. financial system after the market disturbances that began in 2007. The Secretary of the Treasury has used authority given to him under the TARP to make direct capital investments in various U.S. financial institutions. The EESA, as amended by ARRA, contains compensation restrictions for highly-paid executives of financial institutions that receive assistance under TARP. These restrictions, which apply for so long as TARP assistance remains outstanding, include a prohibition against a financial institution's payment of bonuses, retention awards, or incentive compensation, other than payments of long-term restricted stock that is not fully vested and is in an amount that does not exceed one-third of the individual's total compensation. The ARRA included an exception from the prohibition to allow bonus payments that were payable pursuant to written employment contracts executed on or before February 11, 2009, as determined by the Secretary.

Also in response to the market disturbances that began in 2007, HERA contained provisions specifically designed to stabilize the housing finance market, in part by allowing the Treasury Secretary to make direct investments in the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), or a Federal Home Loan Bank (collectively, GSEs). Like EESA, HERA contained various restrictions on compensation of executives of a GSE receiving a direct capital investment from the Treasury.

In early 2009, it came to light that some large institutions that received public funds through a direct capital investment from the Treasury under the TARP or HERA had, while those investments remained outstanding and while performing unsatisfactorily at an institutional level, paid sizable bonuses to executives and other highly-compensated employees.

Both the public and many members of Congress expressed outrage at the idea that institutions that were depending on public funds for their continued existence during a severe economic downturn would provide very large bonuses and retention payments to their executives and employees while the public funds were still outstanding. In response to this situation, some members of Congress expressed a desire to address any gaps in the existing compensation restrictions applica-

ble to such institutions, for example by expanding coverage to a broader group of employees, by establishing compensation limits that would apply equally to recipients of funds under both the TARP and HERA, and by limiting a provision that permitted recipients of TARP assistance to make certain bonus payments that were due under contracts that were entered prior to February 11, 2009.

HEARINGS

Discussion of the payment of bonuses to American International Group employees took place during two hearings. First, the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises held a hearing on March 18, 2009, entitled "American International Group's Impact on the Global Economy: Before, During and After Federal Intervention." The following witnesses testified: Mr. Scott Polakoff, Acting Director, Office of Thrift Supervision; the Honorable Joel Ario, Insurance Commissioner, Pennsylvania Insurance Department, on behalf of the National Association of Insurance Commissioners; Ms. Orice M. Williams, Director, Financial Markets and Community Investment, Government Accountability Office; Mr. Rodney Clark, Managing Director, Insurance Ratings, Standard & Poor's; and Mr. Edward M. Liddy, Chairman and Chief Executive Officer, American International Group.

Second, the Committee on Financial Services held a hearing on March 24, 2009, entitled "Oversight of the Federal Government's Intervention at American International Group." The following witnesses testified: The Honorable Timothy F. Geithner, Secretary of the Treasury; The Honorable Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System; and Mr. William C. Dudley, President and Chief Executive Officer, Federal Reserve Bank of New York.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on March 25, 2009, and on March 26, 2009, ordered H.R. 1664, to amend the executive compensation provisions of the Emergency Economic Stabilization Act of 2008 to prohibit unreasonable and excessive compensation and compensation not based on performance standards, as

amended, favorably reported to the House by a record vote of 38 yeas and 22 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Mr. Frank to report the bill, as amended, to the House with a favorable recommendation was agreed to by a record vote of 38 yeas and 22 nays (Record vote no. FC-9). The names of Members voting for and against follow.

Record vote no. FC-9

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. Frank	X			Mr. Bachus		X	
Mr. Kanjorski	X			Mr. Castle			
Ms. Waters				Mr. King (NY)		X	
Mrs. Maloney	X			Mr. Royce	X		
Mr. Gutierrez	X			Mr. Lucas		X	
Ms. Velázquez	X			Mr. Paul		X	
Mr. Watt	X			Mr. Manzullo		X	
Mr. Ackerman	X			Mr. Jones	X		
Mr. Sherman	X			Mrs. Biggert		X	
Mr. Meeks	X			Mr. Miller (CA)			
Mr. Moore (KS)	X			Mrs. Capito		X	
Mr. Capuano	X			Mr. Hensarling		X	
Mr. Hinojosa				Mr. Garrett (NJ)		X	
Mr. Clay				Mr. Barrett (SC)		X	
Mrs. McCarthy	X			Mr. Gerlach		X	
Mr. Baca				Mr. Neugebauer		X	
Mr. Lynch	X			Mr. Price (GA)		X	
Mr. Miller (NC)	X			Mr. McHenry			
Mr. Scott	X			Mr. Campbell		X	
Mr. Green	X			Mr. Putnam		X	
Mr. Cleaver	X			Mrs. Bachmann			
Ms. Bean	X			Mr. Marchant		X	
Ms. Moore (WI)	X			Mr. McCotter		X	
Mr. Hodes	X			Mr. McCarthy		X	
Mr. Ellison				Mr. Posey		X	
Mr. Klein	X			Ms. Jenkins		X	
Mr. Wilson	X			Mr. Lee		X	
Mr. Perlmutter	X			Mr. Paulsen			
Mr. Donnelly	X			Mr. Lance		X	
Mr. Foster	X						
Mr. Carson	X						
Mr. Speier	X						

Record vote no. FC-9

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. Childers.....	X						
Mr. Minnick.....	X						
Mr. Adler.....	X						
Ms. Kilroy.....	X						
Mr. Driehaus.....	X						
Ms. Kosmas.....							
Mr. Grayson.....	X						
Mr. Himes.....	X						
Mr. Peters.....	X						
Mr. Maffei.....	X						

During the consideration of the bill, the following amendment was disposed of by a record vote. The names of Members voting for and against follow:

An amendment by Mr. Miller of North Carolina, No. 2, regarding consultation with the Chairperson of Congressional Oversight Panel, was agreed to by a record vote of 36 yeas and 24 nays (Record vote no. FC-8):

Record vote no. FC-8

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. Frank.....	X			Mr. Bachus.....		X	
Mr. Kanjorski.....	X			Mr. Castle.....			
Ms. Waters.....				Mr. King (NY).....		X	
Mrs. Maloney.....	X			Mr. Royce.....		X	
Mr. Gutierrez.....	X			Mr. Lucas.....		X	
Ms. Velázquez.....	X			Mr. Paul.....		X	
Mr. Watt.....	X			Mr. Manzullo.....		X	
Mr. Ackerman.....	X			Mr. Jones.....		X	
Mr. Sherman.....	X			Mrs. Biggert.....		X	
Mr. Meeks.....	X			Mr. Miller (CA).....			
Mr. Moore (KS).....	X			Mrs. Capito.....		X	
Mr. Capuano.....	X			Mr. Hensarling.....		X	
Mr. Hinojosa.....				Mr. Garrett (NJ).....		X	
Mr. Clay.....				Mr. Barrett (SC).....		X	
Mrs. McCarthy.....	X			Mr. Gerlach.....		X	
Mr. Baca.....				Mr. Neugebauer.....		X	

Record vote no. FC-8

Representative	Aye	Nay	Present	Representative	Aye	Nay	Present
Mr. Lynch	X			Mr. Price (GA)		X	
Mr. Miller (NC)	X			Mr. McHenry			
Mr. Scott	X			Mr. Campbell		X	
Mr. Green	X			Mr. Putnam		X	
Mr. Cleaver	X			Mrs. Bachmann			
Ms. Bean	X			Mr. Marchant		X	
Ms. Moore (WI)	X			Mr. McCotter		X	
Mr. Hodes	X			Mr. McCarthy		X	
Mr. Ellison				Mr. Posey		X	
Mr. Klein	X			Ms. Jenkins		X	
Mr. Wilson	X			Mr. Lee		X	
Mr. Perlmutter	X			Mr. Paulsen			
Mr. Donnelly	X			Mr. Lance		X	
Mr. Foster	X						
Mr. Carson	X						
Mr. Speier	X						
Mr. Childers	X						
Mr. Minnick	X						
Mr. Adler	X						
Ms. Kilroy	X						
Mr. Driehaus	X						
Ms. Kosmas							
Mr. Grayson	X						
Mr. Himes	X						
Mr. Peters	X						
Mr. Maffei	X						

The following amendments were also considered:

An amendment by Mr. Frank, No. 1, a manager's amendment, was agreed to by a voice vote.

An amendment by Mr. Posey, No. 3, regarding a prohibition relating to technical defaults, was offered and withdrawn.

An amendment by Mr. Sherman, No. 4, providing for a reporting requirement, was agreed to by a voice vote.

An amendment by Mr. Sherman, No. 5, regarding unreasonable or excessive compensation, was not agreed to by a voice vote.

An amendment by Mr. Frank, No. 6, clarifying direct capital investment, was agreed to by a voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a hearing and made findings that are reflected in this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

The purpose of this bill is to prohibit financial institutions that receive direct capital investments under the Troubled Asset Relief Program and institutions that receive direct capital investments under the Housing and Economic Recovery Act of 2008 from paying their executives and employees (a) compensation that is unreasonable or excessive or (b) bonuses or other supplemental payments that are not directly based on performance-based standards for the period during which such investments remain outstanding.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

[Insert CBO estimate here]



CONGRESSIONAL BUDGET OFFICE
U.S. Congress
Washington, DC 20515

Douglas W. Elmendorf, Director

March 30, 2009

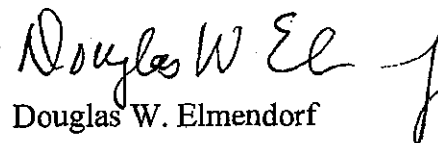
Honorable Barney Frank
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1664, a bill to amend the executive compensation provisions of the Emergency Economic Stabilization Act of 2008 to prohibit unreasonable and excessive compensation and compensation not based on performance standards.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Jeff Holland, who can be reached at 226-2880.

Sincerely,


Douglas W. Elmendorf

Enclosure

cc: Honorable Spencer Bachus
Ranking Member



CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

March 30, 2009

H.R. 1664

A bill to amend the executive compensation provisions of the Emergency Economic Stabilization Act of 2008 to prohibit unreasonable and excessive compensation and compensation not based on performance standards

*As ordered reported by the House Committee on Financial Services
on March 26, 2009*

H.R. 1664 would add restrictions on compensation for executives and employees of institutions receiving funds from the Troubled Asset Relief Program (TARP) or who work for Fannie Mae, Freddie Mac, or the Federal Home Loan Banks. Such restrictions would prohibit bonuses or other additions to base salary if certain standards, as determined by the Secretary of the Treasury in conjunction with other organizations, are not met. Financial institutions subject to the requirements of the bill would have to report information on the compensation of employees that receive income above certain levels. CBO estimates that enacting H.R. 1664 would have no significant impact on the federal budget and would not affect direct spending or revenues.

H.R. 1664 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

H.R. 1664 would impose a private-sector mandate, as defined in UMRA, to the extent that it would invalidate existing compensation arrangements between some financial institutions that have received funds from the TARP and executives or employees of those institutions. The costs of complying with the mandate would be the value of the compensation forgone as a result of the bill's prohibition on compensation that is "unreasonable or excessive". Those costs would depend in part on the standards governing unreasonable or excessive compensation that would be established by the Secretary. Because of uncertainty about those standards and a lack of information about existing compensation arrangements, CBO cannot determine whether the cost, if any, would exceed the annual threshold established in UMRA for private-sector mandates (\$139 million in 2009, adjusted annually for inflation).

The CBO staff contact for this estimate is Jeff Holland. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional Authority of Congress to enact this legislation is provided by Article 1, section 8, clause 1 (relating to the general welfare of the United States) and clause 3 (relating to the power to regulate interstate commerce).

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

H.R. 1664 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

*Section 1. Prohibition on Certain Compensation.**Scope of coverage.*

This section applies to an institution that has received or receives a direct capital investment under the TARP or HERA during the period in which that direct capital investment remains outstanding. An institution that has not itself received a direct capital investment from

the Treasury is not subject to the restrictions of this section as a result of doing business with an institution that has received a direct capital investment, or as a result of participating in another TARP-related program that involves an interaction with an institution that has received a direct capital investment.

Subsection (a) – Prohibition on Certain Compensation Not Based on Performance Standards.

This subsection amends section 111 of EESA (12 U.S.C. 5221) to add a new subsection (e) that would prohibit certain compensation that is not based on performance standards established the Treasury Secretary and require institutions subject to these prohibitions to report certain compensation data to the Treasury Secretary annually.

Specifically, new subsection (e)(1) would add restrictions that would apply broadly to all executives and employees of an institution that has received a direct capital investment from the Treasury under the TARP or HERA while that investment remains outstanding. Regardless of when a compensation payment arrangement was entered into, an institution subject to this provision would be prohibited from:

- paying any compensation that is “unreasonable or excessive,” as defined in standards established by the Treasury Secretary; or
- paying any bonus or other supplemental payment that is not directly based on performance-based measures set forth in standards establish by the Treasury Secretary.

These restrictions do not apply to a longevity bonus or a payment in the form of restricted stock.

New subsection (e)(2) would require the Treasury Secretary to establish the unreasonable-or-excessive and performance-based bonus standards that apply for purposes of paragraph (e)(1) within 30 days of the bill’s enactment. In so doing, he would be required to consult with the Chairperson of the Congressional Oversight Panel and obtain approval of the agencies that are members of the Federal Financial Institutions Examination Council.

New subsection (e)(3) would require an institution that is subject to subsection (e) to submit an annual report to the Treasury Secretary stating how many executives and employees received or will receive total compensation that exceeds specified dollar amounts during the fiscal year. This provision does not require reporting of individual compensation data, but rather requires reporting only of the aggregate number of individuals who received total compensation exceeding the specified dollar amounts. The Secretary shall make such reports available on the Internet.

Subsection (b) – Revision to Rule of Construction.

This subsection revises the rule of construction in section 111(b)(3)(D)(iii) of EESA (12 U.S.C. 5221(b)(3)(D)(iii)) in a manner that would broaden the application of the existing restrictions on bonuses, retention awards, and incentive compensation for highly-compensated employees, which are set forth in section 111(b)(3)(D). Specifically, this subsection would provide that these restrictions, which were added to EESA by Title VII of ARRA, would apply to an institution that has received a direct capital investment under the TARP while such investment remained outstanding, without regard to when the arrangement to pay such compensation was entered into.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

EMERGENCY ECONOMIC STABILIZATION ACT OF 2008

DIVISION A—EMERGENCY ECONOMIC
STABILIZATION

* * * * *

TITLE I—TROUBLED ASSETS RELIEF
PROGRAM

* * * * *

SEC. 111. EXECUTIVE COMPENSATION AND CORPORATE GOVERNANCE.

(a) * * *

(b) EXECUTIVE COMPENSATION AND CORPORATE GOVERNANCE.—
(1) * * *

* * * * *

(3) SPECIFIC REQUIREMENTS.—The standards established under paragraph (2) shall include the following:

(A) * * *

* * * * *

(D)(i) * * *

* * * * *

(iii) The prohibition required under clause (i) shall not be construed to prohibit any bonus payment required to be paid pursuant to a written employment contract executed on or before February 11, 2009, as such valid employment contracts are determined by the Secretary or the designee of the Secretary, *except that an entity subject to subsection (e) may not, while a capital investment described in that subsection remains outstanding, pay a bonus or other supplemental payment that is otherwise prohibited by clause (i) without regard to when the arrangement to pay such a bonus was entered into.*

* * * * *

(e) PROHIBITION ON CERTAIN COMPENSATION NOT BASED ON PERFORMANCE STANDARDS.—

(1) PROHIBITION.—No financial institution that has received or receives a direct capital investment under the Trou-

bled Assets Relief Program under this title, or with respect to the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a Federal home loan bank, under the amendments made by section 1117 of the Housing and Economic Recovery Act of 2008, may, while that capital investment remains outstanding, make a compensation payment, other than a longevity bonus or a payment in the form of restricted stock, to any executive or employee under any existing compensation arrangement, or enter into a new compensation payment arrangement, if such compensation payment or compensation payment arrangement—

(A) provides for compensation that is unreasonable or excessive, as defined in standards established by the Secretary, in consultation with the Chairperson of the Congressional Oversight Panel established under section 125, in accordance with paragraph (2); or

(B) includes any bonus or other supplemental payment that is not directly based on performance-based measures set forth in standards established by the Secretary in accordance with paragraph (2).

Provided that, nothing in this paragraph applies to an institution that did business with a recipient of a direct capital investment under the TARP.

(2) **STANDARDS.**—Not later than 30 days after the date of enactment of this subsection, the Secretary, with the approval of the agencies that are members of the Federal Financial Institutions Examination Council, and in consultation with the Chairperson of the Congressional Oversight Panel established under section 125, shall establish the following:

(A) **UNREASONABLE AND EXCESSIVE COMPENSATION STANDARDS.**—Standards that define “unreasonable or excessive” for purposes of subparagraph (1)(A).

(B) **PERFORMANCE-BASED STANDARDS.**—Standards for performance-based measures that a financial institution must apply when determining whether it may provide a bonus or retention payment under paragraph (1)(B). Such performance measures shall include—

(i) the stability of the financial institution and its ability to repay or begin repaying the United States for any capital investment received under this title;

(ii) the performance of the individual executive or employee to whom the payment relates;

(iii) adherence by executives and employees to appropriate risk management requirements; and

(iv) other standards which provide greater accountability to shareholders and taxpayers.

(3) **REPORTING REQUIREMENT.**—

(A) **IN GENERAL.**—Any financial institution that is subject to the requirements of paragraph (1) shall, not later than 90 days after the date of enactment of this subsection and annually on March 31 each year thereafter, transmit to the Secretary, who shall make a report which states how many persons (officers, directors, and employees) received

or will receive total compensation in that fiscal year in each of the following amounts:

- (i) over \$500,000;
- (ii) over \$1,000,000;
- (iii) over \$2,000,000;
- (iv) over \$3,000,000; and
- (v) over \$5,000,000.

The report shall distinguish amounts the institution considers to be a bonus and the reason for such distinction. The name or identity of persons receiving compensation in such amounts shall not be required in such reports. The Secretary shall make such reports available on the Internet. Any financial institution subject to this paragraph shall issue a retrospective annual report for 2008 and both a prospective and retrospective annual report for each subsequent calendar year until such institution ceases to be subject to this paragraph.

(B) **TOTAL COMPENSATION DEFINED.**—For purposes of this paragraph, the term “total compensation” includes all cash payments (including without limitation salary, bonus, retention payments), all transfers of property, stock options, sales of stock, and all contributions by the company (or its affiliates) for that person’s benefit.

[(e)] (f) **SHAREHOLDER APPROVAL OF EXECUTIVE COMPENSATION.**—

(1) * * *

* * * * *

[(f)] (g) **REVIEW OF PRIOR PAYMENTS TO EXECUTIVES.**—

(1) * * *

* * * * *

[(g)] (h) **NO IMPEDIMENT TO WITHDRAWAL BY TARP RECIPIENTS.**—Subject to consultation with the appropriate Federal banking agency (as that term is defined in section 3 of the Federal Deposit Insurance Act), if any, the Secretary shall permit a TARP recipient to repay any assistance previously provided under the TARP to such financial institution, without regard to whether the financial institution has replaced such funds from any other source or to any waiting period, and when such assistance is repaid, the Secretary shall liquidate warrants associated with such assistance at the current market price.

[(h)] (i) **REGULATIONS.**—The Secretary shall promulgate regulations to implement this section.

* * * * *

Dissenting Views

March 30, 2009

H.R. 1664, the "Pay for Performance Act"

Rep. Alan Grayson (D-FL)

H.R. 1664 amends the Emergency Economic Stabilization Act of 2008 (EESA) to prohibit any recipient of a "capital investment" by the Federal government under the Troubled Asset Relief Program (TARP) or the Housing and Economic Recovery Act of 2008 (HERA), including Fannie Mae, Freddie Mac, and the Federal Home Loan Banks, from making any compensation payments that are "unreasonable or excessive," and any bonus payment that is not "performance-based," so long as such an investment is outstanding. The bill would prohibit any such payments to any executive or employee under any existing or future compensation arrangement. It gives the Secretary of the Treasury the authority, in consultation with the Chairperson of the TARP Congressional Oversight Panel and with the approval of the financial regulatory agencies that comprise the Federal Financial Institutions Examination Council (FFIEC), to define what constitutes "unreasonable or excessive" compensation and to establish "performance-based" measures for bonuses. In addition, the bill essentially repeals the so-called "Dodd amendment" contained in the economic stimulus bill, so that bonus restrictions imposed on TARP recipients apply regardless of the date on which the bonus agreement was entered into.

House Republicans strongly object to excessive compensation and bonuses paid to executives of firms that have received taxpayer dollars, particularly those, like the American International Group (AIG), that will almost certainly never be able to pay a large portion of that money back. The recent revelations that the Democratic administration and Democratic Congress inserted language in the stimulus bill insulating from legal challenge some \$165 million in bonuses paid to executives at AIG, whose failure has cost taxpayers \$173 billion, have provoked justifiable public outrage. H.R. 1664 is an effort to cover the Democratic Majority's tracks, and "change the subject" from the administration's failure to exercise adequate oversight of the taxpayer dollars expended to prop up AIG.

While many House Republicans did not support the establishment of the Troubled Asset Relief Program -- and most voted to disapprove release of the second \$350 billion tranche of the TARP funds -- it is now Congress' responsibility to ensure that the program works as effectively as possible and that the taxpayers' investment is returned as quickly as possible. Unfortunately, this overly broad and punitive legislation will work at cross-purposes with that objective. The success of the taxpayer-subsidized public-private partnerships created by the Obama administration to purge toxic assets from banks' balance sheets hinges almost entirely on the willingness of the private sector to invest its capital alongside the government. As drafted, H.R. 1664's executive compensation restrictions would not extend to these private sector investors.

However, the legislation does send an unmistakable message to financial institutions considering whether to enter into partnership with the government that Congress can and will change the rules of the game at any time. This will inevitably discourage participation in a program that the Obama administration has characterized as essential to stabilizing the financial system.

During consideration of H.R. 1664, the Committee adopted on a straight party-line vote an amendment offered by Rep. Brad Miller (D-NC) requiring the Secretary of the Treasury to consult with the Chair of the TARP Congressional Oversight Panel (COP) in determining what constitutes unreasonable or excessive compensation and performance-based compensation measures. Given its limited mandate, the Congressional Oversight Panel has no expertise on the issue of executive compensation, no expertise on the subject of corporate governance, and no formal legal standing even to issue recommendations on policy questions. As its name might indicate, the Congressional Oversight Panel is strictly an oversight panel, and it was never intended nor is it authorized to set policy. Even overlooking the statutory limitations on the Panel from the EESA, the fact remains that the Congressional Oversight Panel has not conducted a single public hearing on compensation that might have given it any particular insight on the subject. Moreover, the Miller Amendment poses a clear conflict of interest for the Congressional Oversight Panel. By requiring the Chair of the Panel to have a consultative role with the Secretary on TARP decisions related to compensation, the line between decision makers and oversight authorities will be impossibly blurred, potentially calling into question the reliability of any future oversight work the Panel might ultimately conduct on executive compensation matters.

The easy solution throughout the recent period of financial turmoil has been to hand the taxpayer the bill for rescuing "too big to fail" financial institutions without evaluating the long-term consequences. Rather than projecting the Federal government further and further into the private economy, we should, instead, formalize and execute a responsible exit strategy that ensures taxpayers are repaid. The best approach to protecting the taxpayers' investment in private business is through stronger oversight and accountability, not by further entrenching government in the operations and management of hundreds of businesses across America, many of which are community and regional banks that did nothing to create the current crisis. Indeed, given the government's track record in piling up huge deficits and mismanaging a wide range of Federal programs, there is little reason to believe that it will have any more success in running private enterprises. .

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